

IN THE

**Supreme Court of the United States**

October Term, 1976.

No. **76-1054**

GIUSEPPE CATANZARO,

*Petitioner,*

*against*

CENTRAL GULF STEAMSHIP CORP.,

*Respondent,*

*against*

UNITED STATES OF AMERICA,

*Third Party Respondent.*

**Brief of Respondent in Opposition to Petition for a  
Writ of Certiorari to the United States Court of Ap-  
peals for the Second Circuit.**

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition seeks review of the unanimous decision of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York, based upon a jury verdict, dismissing the petitioner's suit for personal injuries.

### Questions Presented.

The question presented is whether, under Rule 19 of this court in a dispute between private parties of no constitutional or statutory import, should this court intervene particularly where the petition herein mirrors the brief submitted by the petitioner to the Second Circuit Court of Appeals.

### Constitutional Provisions and Statute Involved.

The quotations by the petitioner of portions of the United States Constitution Amendment V and 46 United States Code #688 are not apropos. Neither is at issue in this suit.

### Statement of the Case.

The SS GREEN FOREST, owned by the respondent, under charter to the United States of America left the west coast of the United States with a full cargo of ammunition for Viet Nam to be discharged there at the direction of the military command in that country. The vessel arrived and docked in Cam Rahn Bay at the ammunition pier as directed by the military. The portion of the cargo destined for Cam Rahn Bay was discharged by about noon on October 31, 1970, and the vessel remained at the pier awaiting orders from the charterer.

At approximately 2:40 P.M., the harbor master declared an emergency due to incoming rockets. He dispatched an army undocking pilot, Mr. Waddell, and an army tug under the command of Mr. Price with instructions immediately to remove the SS GREEN FOREST from the ammunition pier and head her down the channel. The army pilot boarded the vessel and ordered the Captain to unwarp the vessel and prepare for an immediate departure. The

army tug moved along side the SS GREEN FOREST awaiting the orders of the pilot. Mr. Catanzaro, a crew member of the SS GREEN FOREST, was directed to take in the vessel's starboard mooring lines. While the spring line was in process of being hauled on to the vessel the army tug moved in against the starboard bow of the SS GREEN FOREST to swing the ship in to the channel. The spring line which was moving across the forward portion of the tug momentarily snarled in a cruciform bitt of the tug causing the line to tauten and surge with a resultant backlash which injured Mr. Catanzaro. The third-party defendant, the United States of America, produced at the trial Mr. Waddell and Mr. Price. Mr. Price testified that he has worked with Captain Waddell on numerous occasions in Cam Rahn Bay and that on the day in question, he had observed two explosions in the vicinity of Piers 4 and 5, Pier 5 being the ammunition pier (TT 497). He, further, testified that during emergencies it was customary to start his tug ahead while a vessel's spring line was still moving across his tug. In normal circumstances, he would wait until the lines were clear (TT 503).

Apparently relying on this testimony as well as the balance of the testimony, the jury found that the accident was not caused by any negligence of this respondent or unseaworthiness of the vessel.

### Reasons for Denying the Writ.

The petitioner argues that derogatory comments of the trial court pertaining to the plaintiff's expert witness and his counsel and prejudicial remarks of defense counsel constitute prejudicial error.

It is interesting to note that the trial consumed five full days of the court's time and a trial transcript runs some 640 pages. The petitioner has chosen to take certain comments of the trial court completely out of context without relating the circumstances in which they were made.



Concerning the plaintiff's "expert" the testimony of this witness commences at TT 223. His expertise had never been conceded by the defendant nor ruled upon by the court when at page TT 225 plaintiff's counsel commenced laying the ground work for a hypothetical question by referring to documents which were not in evidence and an exhibit which the witness had never seen. This caused the trial court to use the expression "this proposed expert." It is submitted that plaintiff's counsel's inept framing of questions and repeating questions upon which the court had ruled irked the trial court. Any remarks of the trial court were provoked by the conduct of plaintiff's counsel. It is of interest to note that no objections are found in the trial transcript to any remark made by the defendant's counsel in either the opening or the closing statements or his conduct of the trial.

It is important to note that in its charge to the jury, the trial court clearly stated:

"During the course of this trial and during summations, anything that has been said by counsel or by the Court during these summations or during the course of the trial is not to be taken by you in place of your own recollection of the facts or the evidence. No comments by counsel or by the Court are evidence. You are to draw no inference from any such comments" (TT 583).

The court continued:

"Nothing that the Court said is to be construed to indicate what your determination should be except, of course, that I expect you to follow these instructions which I am now giving you" (TT 584).

The petitioner also based his request for review on the trial court's refusal in mid-trial to permit the petitioner to engage a new counsel.

Federal Rules of Civil Practice 41 (a) specifically provides that after a defendant has interposed an answer, an action cannot be dismissed on plaintiff's motion except by orders of the court and upon such terms and conditions as the court deems proper. In the present case after the completion of all pre-trial procedures, the calling of the case for trial, the selection of a jury and the taking of the plaintiff's testimony, on the second day of the trial, plaintiff advised the court in chambers that he wished to substitute counsel. No substitute counsel as yet had been employed by the plaintiff. The attorney for the defense advised the court that he had arranged for an out of town witness from Virginia to appear in New York to testify at the trial and therefore could not consent to a mistrial. Counsel for the third-party defendant similarly indicated that he had arranged for two out of town witnesses from New Orleans who were en route to New York. In the circumstances, the trial court advised the plaintiff that it could not grant a mistrial to permit plaintiff to seek new counsel unless the plaintiff agreed to compensate opposing counsel for their time and disbursements. The court thereupon adjourned after which further conferences amongst the counsel and the court were had concerning the possibility of settling the case. The trial then continued without objection of plaintiff to continuing with his original attorney. In passing it should be noted by this court that in this action plaintiff was originally represented by an attorney named Murray Bogatin, represented at trial by Klein, Cohen & Schwartzberg, the notice of appeal to the Second Circuit was filed by Murray Bogatin, the brief and oral argument were filed and conducted in the Second Circuit on plaintiff's behalf by the firm of Shapiro & Somer. The petition for certiorari has been filed by William F. Mackey, Jr.

We cannot agree with the allegations appearing on page 17 that the petitioner is indigent. Presumably he paid costs of the trial transcript, the printing of the brief in the Second Circuit and the costs of printing the petition herein.

**Conclusion.**

For the reasons set forth herein it is abundantly clear that neither the trial court nor the Circuit Court is guilty of the misconduct alleged by the petitioner.

The petition herein should be denied.

Respectfully submitted,

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